Convocation 2002

Changes to the REIQ contract

- The Reference Schedule to the REIQ houses and land contract and the lots in a Community Titles Scheme ("CTS") contract has been amended to contain provision for disclosure concerning the installation of an approved safety switch. This section will not be required to be completed if the land is vacant (in the case of the houses and land contract) or if the present use is a commercial use (in the case of the lots in a CTS contract).

  This amendment is consistent with the introduction into these contracts of new definitions in clause 1.1(2) of "Approved Safety Switch" and "General Purpose Socket Outlet", as these terms are defined in the *Electricity Act 1994* (Qld).

  Why have these changes been made to the standard contracts?

  New provisions of the *Electricity Regulation 1994 (Qld)* ("the regulation") concerning safety switches commenced on 1 September 2002 (from the 1st of October 2002 substantially similar provisions are now to be found in the *Electrical Safety Regulation 2002 (Qld).* The objective of these provisions is to prevent fatalities and injuries to the public caused by electric shock in domestic residences. The regulations require the transferor of a domestic residence (which includes a lot in a community titles plan where the lot is used for residential purposes) to disclose to a transferee and the chief executive whether an approved safety switch is installed for the general-purpose socket outlets (power points) installed in the domestic residence on the land. If an approved safety switch has not been installed, the incoming transferee has 90 days to install a safety switch from the time of entering into possession (so in essence the obligation to install a safety switch is triggered by the transfer).

  The obligation to notify the transferee and the chief executive applies to all transferors who have entered into a contract dated on or after 1 September 2002.

  What is the effect if the Seller leaves these disclosure boxes in the Reference Schedule blank?

  First, it should be noted that the regulation does not require that disclosure be made in the contract of sale. Written notice is only required prior to the date for possession of the land. Accordingly there would be no impediment to the Seller providing the written notice up until this time. If notice is not given on or before the date

of possession for the land the transferor will be liable to a maximum penalty of 15 penalty units: S78 (1) *Electrical Safety Regulation 2002* (Qld)

The regulation also provides for a possible fine of 15 penalty points ($1,125) if the transferor **states** anything in the notice that is false or misleading. It is suggested that a mere failure to complete a box in the Reference Schedule would not be construed as a false or misleading statement, particularly given that the obligation may still be satisfied in the time contemplated by the regulation. This situation may be contrasted with a situation where the seller states falsely that an approved safety switch has been installed.

Apart from potential exposure to a penalty, what is the contractual effect if no disclosure is made prior to the date for possession?

The transferor is not required by the regulation to warrant the existence or lack of a safety switch or that any existing safety switch complies with the requirements of the regulation. Consequently, a failure by the transferor to advise the transferee that the property does not have an approved safety switch is unlikely to allow the buyer to terminate the contract (other than under the building inspection clause) or to claim compensation. In addition, any failure to disclose will not affect a buyer's obligation to install an approved safety switch within 90 days of possession in accordance with s80 *Electrical Safety Regulation 2002* (Qld).

- Also in the Definitions clause of the REIQ contracts, the definition of "Balance Purchase Price" has been amended. This amendment is intended to make it clear (by the reference to clause 2.6(11) in the houses and land contract and clause 2.6(15) in the lots in a CTS contract) that those bank cheques for which the seller is responsible may be made the subject of a settlement adjustment.

- Which bank cheques is the seller (rather than the buyer) responsible for the cost of?

  As mentioned, the relevant clauses are clause 2.6 (11) (houses and land) and clause 2.6 (15) (lots in a CTS). These clauses provide that the Buyer is only responsible for the cost of bank cheques payable at settlement to the Seller or the Seller's mortgagee. The cost of bank cheques payable to any other parties is to be borne by the Seller.

  Certain points should be noted:

  The singular reference to mortgagee will include a reference to the plural (clause 10.8(1) of the houses and land contract and 11.8(1) of the lots in a CTS contract) so if the Seller has more than one

mortgagee the Buyer will meet the cost of bank cheques payable to such mortgagees.

The reference is to the Seller not to the Seller's solicitors so the Seller will meet the cost of bank cheques made payable to their solicitor's trust account.

- The building and pest inspection report condition has been amended. Clause 4.1 now provides that the contract is conditional (if the relevant part of the Reference Schedule is completed) upon the Buyer obtaining **written** building and pest reports (subject to the right of the Buyer to elect to obtain only one of these reports).

  Clauses 4.4 and 4.5 are new. Clause 4.4 provides that if requested by the Seller, the Buyer must give a copy of the relevant inspection report to the Seller without delay. This right will survive any alleged contractual termination by the Buyer.

  Clause 4.5 provides that if required under the *Building Services Authority Act 1991* (Qld), the Inspector must hold a current licence under that Act. This means that an inspection will need to be performed by a registered builder or an inspector who is duly licensed under the Act to perform such inspections.

- Clause 8.2 (4) has been added to provide that, after reasonable notice to the Seller, the Buyer and its consultants may enter the Property once to value the Property before settlement.

- A significant change is the addition of clause 10.5(2) (clause 11.5(2) of the lots in a CTS contract). This clause provides that if the Finance Date or Inspection Date falls on a day that is not a Business Day, then it fall on the next Business Day.

  Under the previous editions of the Houses and Land and lots in a CTS contracts the relevant clause simply provided that if anything was required to be done on a day that was not a business day it must be done on the next business day. The application of this clause to obligations under the contract was determined by a construction of the words "required to be done on a day". This will have obvious application to a clause like clause 5.1 that requires settlement on a particular day. However, clauses like the finance and building inspection clauses that require a party to notify of finance "by the Finance Date" or to terminate for an unsatisfactory building inspection "at any time before 5pm on the Inspection Date" may not be subject to the previous version of the clause. Neither clause 3.2 or 4.2 requires a thing to be done on a particular day. The buyer is entitled to exercise their rights at any time prior to or on the date specified in the contract. It is not the same as settlement that is required by the contract to occur on a certain day and not before (unless consensual agreement). The distinction is

between an obligation to do something on a certain day (clause 5.1) and a right to do something up to a certain day (clauses 3 and 4). It is also relevant that in the case of clause 5.1 the date fixed by the contract cannot be varied by one of the parties unilaterally, whereas in the case of clauses 3 and 4 the buyer has control over the day on which notice is given.

Arguably therefore, under the terms of the previous contracts, where a finance date or building inspection date fell on a weekend or public holiday the buyer would need to exercise their rights prior to that particular date. The previous contractual provision would **not** allow the buyer to exercise their rights on the next business day.

The application of clause 10.5 (clause 11.5 in the lots in a CTS contract) to the Finance and Building Inspection clauses has now been addressed in the latest edition of the contracts. Clause 10.5(2) (clause 11.5(2) in the lots in a CTS contract) now provides expressly that if the finance date under clause 3 or the inspection date under clause 4 fall on a day that is not a business day, then the date is deemed to fall on the next business day.

This means that if the finance date falls on a Saturday the buyer is entitled to give notice at any time up to 5.00pm on the following Monday (assuming that is a Business Day).

- The finance clause clearly contemplates that the financial institution will make an offer of finance in terms that the buyer can immediately accept. An offer of finance subject to the banks usual terms and condition will not be finance approval in accordance with clause 3: *Jones & Leenders v Smith* (Unreported Dist Ct 1 June 2001). Notification to a seller that finance is approved subject to conditions will not be notice that the finance condition is satisfied or waived. The notice given should clearly and unequivocally indicate that the buyer is satisfied with finance and that the contract is unconditional.

  If finance approval is obtained the notice of the approval should include a statement about the amount of finance obtained, who the financier is and state clearly that the finance is satisfactory. *Jones & Leenders v Smith* unreported District Court Cairns White DCJ 2002.

- If instructed prior to a contract for the purchase of land and improvements being signed, a solicitor should advise the potential purchaser of the prudence of obtaining a building and pest inspection. Would it be negligent not to give such advice?

  In *Berry v Kanakis & Ors* [2002] NSWCA 68 the New South Wales Court of Appeal (Meagher, Giles JJA and Ipp AJA) considered a similar claim against solicitors who acted on the purchase of a house that later became termite infested. Although the claim was ultimately unsuccessful (due to a factual finding that advice to obtain a building report would have been otiose as the purchaser would have purchased regardless), Giles JA (Meagher JA and Ipp AJA agreeing) was prepared to assume that a failure to provide such advice was a breach of the contract of retainer.

- The meaning of "attached" for the purposes of the warning statement required under the *Property Agents and Motor Dealers Act 2002* (Qld) was recently considered by Muir J in *MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320. According to Muir J the word attached may have either a broad or restrictive meaning. A wide approach may result in a warning statement being attached if it is accompanying or is associated with the contract. However, in its restrictive sense, attached would require some form of joinder, fastening or affixation. His Honour stated that there was nothing in s 366 or s 367 which indicated a broad view quite the contrary "the aim of the section appears to be to give prominence to the warning statement by ensuring that not only is it inseparable from the contract proper but that it is the first document to be seen by a prospective purchaser when perusing the contract."

His Honour also considered that the intent of the section could be complied with without the warning statement being stapled, pinned to or bound up with a contract. Muir J gave the example of where the warning statement was the first of a number of loose sheets placed together in a folder and numbered or otherwise identified as the first sheet of the bundle. The suggestion by his Honour being that the folder itself serves to attach the bundle of papers together. In that case his Honour considered it may be arguable that the warning statement was "attached' to the other documents. In the facts before the court that did not occur as the standard REIQ contract was used and written at the bottom of the front page of the contract was "page 1 or 6" and the warning statement did not bear a number. In addition there were other contractual documents in the folder.

The following propositions can be drawn from the judgment:

(a) Generally a warning statement will only be attached to a contract if it is physically joined to the contract.
(b) A warning statement may be attached to a contract where the individual sheets of the contract are placed together in a folder and the warning statement is the first sheet, provided the face of the contract does not indicate that another page is the first page of the contract.
(c) By analogy a contract, which is faxed with the warning statement, clearly indicated as the first page of the contract and the first page of the fax ***may*** be attached to the contract by virtue of having been faxed as one document.

Although Muir J has indicated that it may be possible for a warning statement to be attached as the first page of a bundle of loose pages which all form one contract, each situation will fall to be considered on its individual facts and, ideally, practitioners should avoid such practices.

A further issue that arose for determination by Muir J was whether the right of termination under s 367 of PAMDA (for failure to attach the warning statement to the contract) could be waived by the conduct of the buyer. Waiver will occur where a person with knowledge of two inconsistent legal rights abandons one of those rights by acting in a manner inconsistent with that right. The legal rights will only be inconsistent if neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other: *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641. Muir J in *MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320 considered that the right in s 367 was not waived by a buyer who with knowledge of the contravention of s 366 continues to perform the contract. The reasons for this conclusion were:

-The right to terminate under s 367 and the right to continue with the contract were not inconsistent rights. His Honour held that s 367 gave the buyer a "right to terminate the contract at any time before the contract settles, irrespective of the nature and extent of the performance under the contract and irrespective of the party's conduct by reference to it."

-The time of election did not arise until the time of settlement and a mere intention expressed by conduct not to terminate immediately does not divest the buyer of the right to terminate at a later date.

- What is the position under the standard contracts where the seller has agreed to an extension of the settlement date without specifying that time is to remain of the essence? If the buyer fails to tender on the extended date is the seller entitled to immediately terminate the contract?

  As time was originally of the essence of the contract (clause 6.1 of the REIQ contract), a mere extension of time will not usually operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. There is no destruction of the essential character of the time. The extended date has the same effect as the original date for completion.

  Is the result changed by the seller's failure to expressly specify that time is to remain of the essence (contrary to the result in *Spencer v Cali* [1986] 2 Qd R 456)?

  An issue such as this recently arose for consideration by Justice Wilson in *McPhee v Zarb* [2002] QSC 4. Wilson J opined that although originally of the essence time ceased to be of the essence when the purchasers elected not to terminate and granted an extension of time but failed to expressly remake time of the essence. As such the purchasers (in this instance) were not entitled to immediately terminate for the seller's failure to settle on the extended date for settlement, rather the obligation of the parties was then to complete within a reasonable time.

  Notwithstanding this decision it is suggested that the factual context facing Justice Wilson may well be distinguished from a mere substitution of a new settlement date. In *McPhee v Zarb* there was some doubt about the actual date that settlement had been extended to, neither party tendered performance nor was the conduct of the parties consistent with time being of the essence.

  Notwithstanding this analysis it is undoubtedly prudent practice when granting an extension of any date under the contract to expressly remake time of the essence.

Bill Dixon
Lecturer Law School
Queensland University of Technology
Member Centre for Commercial and Property Law
Consultant, Pattison & Barry